litigation outweighs any benefit that ratepayers may receive from this treatment of settlement expenses.[131] Thus, U S West argues, all settlement costs should be treated as normal operating expenses. We agree that the Commission does not accomplish much if antitrust litigation expenses are subject to a burdensome Commission review that imposes heavy costs on ratepayers, shareholders, the Commission, and taxpayers.[132] But, we do not agree that the appropriate response is to allow settlement costs in any amount as operating expenses,[133] for this could place all the burden of the settlement on ratepayers, whether or not they benefit from settlement. This also could reduce a carrier's incentive to seek the most advantageous settlement terms, while encouraging potential adversaries to seek profit from a carrier's perceived deep pockets. Although USTA argues that market and customer pressures give carriers sufficient incentive to contain litigation costs,[134] there is no guarantee that these pressures will prevent excessive settlements under all circumstances. These pressures and our action here are complementary.

44. Instead, to minimize the burdens on all concerned, we will presume that all settlements of lawsuits brought under federal antitrust laws are for the avoided costs of litigation to the extent that the carrier makes the required showing, as defined *infra* in paragraph 46 and 47, and, while recorded below the line,[135] can be presumed recoverable in ratemaking. We

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[131] U S West at 9; *accord* USTA at 13 (fact intensity of process justifies an individual case reasonableness assessment during ratemaking, not additional rules). *See also* Bell Atlantic at 2 (burden of lengthy and costly proceeding to prove ratepayer benefit); NYNEX at 8 ("the key issue should be reasonableness and prudency of costs as incurred."); *id.* at 11, n. 21.

[132] Commenters' preference for a study of the reasonableness of individual carrier decisions suffers from this same burden of *ad hoc* review, which could be complicated by the Commission's need for information from the carriers before initiating the review. We also doubt that most commenters mean to suggest that the Commission should second guess a carrier's decision to settle. *But see* NYNEX at 8-9. Furthermore, with streamlined regulation to be effective for all LECs in February 1997 pursuant to the Telecommunications Act of 1996, increasing emphasis will be placed on complaints for enforcement of just and reasonable rates. Relying on advance review of challenged rate elements when tariffs are filed will be impractical.

[133] The litigation reviewed by the Commission in *Alascom Recon. Order* was settled by Alascom for a net settlement payment of $17.5 million to the plaintiff. AT&T reimbursed Alascom for additional money. The Commission determined that $6,873,030 of this, when discounted to present value using the authorized rate of return, fell within the presumption of recovery in ratemaking. *See Alascom Recon. Order*, 6 FCC Rcd at 3636, ¶ 4, 3641 ¶ 43. Costs not associated with a favorable verdict, estimated at $13 million for supersedeas bond, plaintiff's legal fees, and retrial expenses, were not allowed under the *Litigation Costs Order* and *Litigation Costs Recon. Order* policy against recovery of the costs of adverse judgments. *See Alascom*, 5 FCC Rcd at 656 ¶ 16, *Alascom Recon. Order*, 6 FCC Rcd at 3639, ¶ 26.

[134] USTA at 15.

[135] The comments of Pacific Companies at 9, 10; SWBT at 17; U S West at 8; and COMSAT at 16 reflect confusion as to whether the avoided costs of litigation would be recorded above or below-the-line. Our proposal was to place all settlement costs below-the-line but to alter the usual presumption attaching to that placement for costs corresponding to the portion of the settlement that represents the avoided costs of litigation. *See NPRM*, 8 FCC Rcd at 6656 ¶ 4, 6657 ¶ 12. This was based on *Litigation Costs Recon. Order*, 4 FCC Rcd at 4097-98, ¶¶ 43-44, 4101

recognize that readopting this presumption will result in some imprecision in amounts presumptively allowable as expenses. We think, however, that this treatment strikes a balance that falls within the range of reasonableness allowed in setting rates, and strikes a more reasonable and less burdensome balance than requiring a Commission determination of whether every antitrust settlement carriers might claim in the ratemaking process was in the public interest. This treatment also acknowledges that lawsuits may be frivolous or unfounded and gives carriers leeway to dispose of such suits without incurring additional burdens at the Commission. Furthermore, it avoids creating any additional incentive for carriers' adversaries to use antitrust allegations for leverage against carriers.

45. To receive recognition of its avoided costs of litigation, a carrier must demonstrate, in a request for special relief, the avoided costs of litigation by showing the amount corresponding to the additional litigation expenses discounted to present value, that the carrier reasonably estimates it would have paid if it had not settled. Settlement costs in excess of the avoided costs of litigation are presumed not recoverable unless a carrier rebuts that presumption by showing the basic factors that induced the carrier to settle and demonstrating that ratepayers benefited from the settlement.[136] Carriers should make any showings in a request for special relief rather than with the tariff filing. Upon making such a showing, the carrier would receive credit in the ratemaking process for the portion of the settlement costs allocated to the interstate jurisdiction under Part 36 of the Commission's Rules, 47 C.F.R. Part 36. We make no determination about the portion of those settlement costs that would be assigned to the intrastate jurisdiction and, additionally, we will not require the ILECs to make any exogenous adjustments to their price cap indexes because of these rule changes.

46. A carrier requesting recovery of the avoided costs of litigation must accompany its request with clear and convincing evidence that, without the settlement, it would have incurred the expenses it estimates. The evidence will, of course, vary according to the circumstances. Among the data a carrier may provide are any available cost estimates provided by the law firm representing the carrier, an estimate of attorney hours needed to complete the case along with the hourly rates for the attorneys involved, information regarding the discovery remaining to be completed, the amount of trial time scheduled by the judge, and information regarding the number of witnesses or documents that would have been introduced at trial, including any pretrial statements filed with the court, costs of expert witnesses, travel time, saved in-house counsel replacement costs, and any other material the carrier considers relevant. The avoided costs of litigation of a pre-judgment settlement would include the anticipated costs of litigating until a judgment. The avoided cost of litigation of a post-judgment settlement would anticipate a successful appeal in the particular case.

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n. 17; *see Alascom Recon. Order*, 6 FCC Rcd at 3636, ¶¶ 2-3. In this way, the accounting for all antitrust settlements would be uniform; only the ratemaking treatment would differ.

[136] This conclusion governs only a carrier's ability to recover through ratemaking for interstate services the interstate portion of these costs.

47. The Pacific Companies have asked how to treat settlements in cases involving multiple claims and settlements. Such settlements can include both monetary and nonmonetary terms in a multiple count case.[137] Carriers should state how they propose to allocate settlement costs between antitrust and other causes of action in their settlement agreements. Only the settlement costs attributed to antitrust claims will be subject to the rules and policies adopted in this Order.[138] The accounting treatment of matters that would ordinarily be treated as operating costs should not change because these matters have been raised in complaints also alleging antitrust violations.[139] We recognize that adversaries may add antitrust allegations to otherwise commercial disputes if they perceive an opportunity for gaining an advantage because of the operation of the Commission's accounting rules and ratemaking presumptions. We caution carriers, however, that this allocation should not attempt to circumvent the Commission's intention that antitrust settlements are presumed to be disallowed in the ratemaking process absent a showing of ratepayer benefit, and we remind carriers that they must make a showing to justify the allocation of costs to the various causes of action contained in a settlement.

D. Litigation Defense Costs

48. For several years the Commission has questioned whether ratepayers should bear the expenses of defending antitrust litigation when a carrier is found to have violated the antitrust laws. In both *Litigation Costs Proceeding* and *Litton Accounting Proceeding*, the Commission concluded that ratepayers should not, and directed carriers to recapture the defense costs recorded in operating accounts by transferring them to a nonoperating account. The court reviewing the rulemaking decision agreed that the Commission could establish a presumption against recovery of litigation expenses in situations where it was legally permitted to create such a presumption with respect to judgments and settlements.[140] It questioned the Commission's decision to recover, in the year in which they were incurred, litigation expenses initially booked above the line but subsequently disallowed because of an adverse judgment. The court criticized the decision because the Commission failed to explain why recapturing expenses does not constitute retroactive ratemaking.[141] The court reviewing *Litton Accounting Proceeding* rejected the Commission's use of recapture, faulting the Commission for failing to consider factors other than simply whether an antitrust violation occurred and whether the carrier succeeded or failed in the

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[137] Pacific Companies at 8.

[138] In contrast, *Litigation Costs Order*, 4 FCC Rcd at 4092, ¶ 5, required judgments and settlements with both federal and state claims to be booked in their entirety below-the-line. Portions that the carrier could convince the Commission were attributable to non-federal claims could subsequently be allowed for ratemaking.

[139] This should alleviate SWBT's concerns about artificially discouraging settlements in cases with multiple claims. *See* SWBT at 18-19.

[140] *Litigation Costs Decision*, 939 F.2d at 1043.

[141] *Id.* at 1044.

litigation.[142] The court stated that the Commission should have examined the reasonableness of allowing recovery for the litigation expenses even though an adverse antitrust judgment was issued against the carriers. The court also stated that the Commission inadequately explained the reasons for its policy change from permitting to denying recovery of litigation expenses.[143]

49. The *NPRM* addressed the retroactive ratemaking question raised in *Litigation Costs Decision* by proposing that carriers should accrue antitrust litigation expenses in a balance sheet deferral account until the underlying antitrust litigation is resolved.[144] If the result is a final adverse judgment or a post-judgment settlement, the expenses would be entered in Account 7370, the same account used for the underlying judgment or settlement. If the carrier prevails or enters into a pre-judgment settlement, however, the expenses would be amortized above the line. The *NPRM* recognized that *dicta* in *Litton Accounting Appeal* contain language unfavorable to the proposal, but observed that the proposed result was not precluded by the court if accompanied by a sufficient rationale.[145]

50. This proposal drew considerable opposition. Although MCI and Rafferty generally support it,[146] the remaining commenters offer many reasons why it would be both bad accounting and bad policy. Commenters emphasize that adopting the proposal will impose significant direct costs on carriers to screen and track every lawsuit for antitrust allegations.[147] Even if the actual number of such allegations is small, the burden will not be. This will create artificial incentives for competitors to threaten or assert antitrust claims for strategic advantage, leverage, or an undeserved settlement.[148] Commenters assert that lawsuits often are complicated by multiple causes of action, multiple defendants, amended complaints, and piecemeal resolution of issues.[149] Commenters also make other arguments in opposition. First, COMSAT claims that expenses must be incurred before there has been any finding of illegal conduct, and recovery later is based entirely on the outcome of litigation, without any consideration of the carrier's prudence in

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[142] *Litton Accounting Appeal*, 939 F.2d at 1031-33.

[143] *Id.* at 1033-35.

[144] *NPRM*, 8 FCC Rcd at 6657-58.

[145] *See Id.* at 6659, citing *Litton Accounting Appeal*, 939 F.2d at 1035.

[146] MCI at 9-10; Rafferty at 1. MCI argues that deferral accounting will not give carriers the expectation of recovery they have when expenses are carried in operating accounts, a concern of the *Litton Accounting Appeal* court. Rafferty recommends amendments to the Commission's cost allocation manual requirements and limits to billable costs for attorneys to $250 per hour, matters which are beyond the scope of this proceeding.

[147] USTA at 27-29; BellSouth at 16, 17-21; SWBT at 23-25; COMSAT Reply at 8.

[148] BellSouth at 22-23; NYNEX at 12; Pacific Companies at 12-13; SWBT at 22-26.

[149] USTA at 27; Pacific at 13; SWBT at 22.

incurring the litigation expenses.[150] Yet, carriers have a right to defend themselves and the business they operate.[151] Second, BellSouth argues that deferral accounting is onerous because investors must bear the full cost of ongoing litigation while it is pending, without assurance of future cost recovery in an increasingly competitive environment.[152] One result may be a higher cost of capital in order to compensate shareholders for their increased risk.[153] Third, several commenters state that deferral accounting is inconsistent with generally accepted accounting principles (GAAP), which the Commission's accounting rules seek to require under the competitive model.[154] Other commenters assert that the proposal will unfairly distort the earnings for sharing purposes of price cap carriers,[155] shift the burden or benefit of the outcome of litigation to future ratepayers,[156] distort financial results over time,[157] and discourage aggressive competition.[158] Finally, four commenters note that a similar proposal was considered and abandoned by the Commission as unworkable.[159]

51. BellSouth's alternative suggestion, that the balance in the deferral account be included in the rate base during the pendency of the litigation illustrates the difficulty in deviating from the use of an operating account for operating expenses. BellSouth argues that it should be allowed to charge the principal balance to operating expense upon successful termination of the litigation.[160] Typically, the rate base includes items related to the company's capital investment, such as land, leases, equipment, and interest on funds borrowed to finance capital investment. Capital investment not yet used and useful for the carrier's business are carried in a deferral account until brought into service, although interest on debt related to the capital investment could be included in the rate base in the interim. BellSouth's proposal would capitalize litigation expenses. BellSouth's second alternative suggestion, that the carrier be able to charge interest

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[150] COMSAT at 21-22.

[151] *E.g.*, at 23-24.

[152] BellSouth at 32; COMSAT Reply at 6-7.

[153] BellSouth at 21.

[154] USTA at 18-19; Bell Atlantic at 3; BellSouth at 11-12; NYNEX at 14-15; Pacific Companies at 14; SWBT at 20-22; U S West 10-11.

[155] Bell Atlantic at 3; BellSouth at 15.

[156] USTA at 19.

[157] NYNEX at 16.

[158] BellSouth at 21, 23.

[159] *Id.* at 1-2; NYNEX at 16; Pacific Companies at 15; COMSAT at 22-23.

[160] *See* BellSouth at 33.

for the deferred litigation expenses to an operating account upon successful termination of litigation, may compensate the carrier partially for the delay in recovering costs, but would exacerbate the distortions to earnings for sharing purposes.

52. After careful consideration of the comments, we conclude that we should not adopt our earlier proposal to require the ILECs to record litigation expenses in a deferral account and, after an adverse judgment, record them below-the-line. Rather, we conclude that we should allow all litigation defense costs to continue to be recorded in operating accounts. Although this is a departure from our previously adopted rule, an important part of our regulatory effort has been to eliminate, when possible, and always to minimize, costs imposed by regulation that burden one competitor more than another. Our proposal could create some incentive for adversaries to bring antitrust suits or add antitrust claims to otherwise normal business litigation. Ratepayers, whom we sought to protect from unnecessary costs, would still bear much of the expense of tracking litigation costs. These factors, as well as the potential distortions to reported earnings, cause us to conclude that the public interest is better served by retaining the status quo. Although the costs of defending litigation will continue to be accounted for as operating expenses, the Commission may still request data about such expenses.

E. Other Types of Litigation

53. The Commission tentatively concluded in the *NPRM* that its litigation cost rules should also apply to state antitrust lawsuits[161] and to lawsuits involving the violation of other federal statutes where the actions giving rise to the litigation did not benefit ratepayers.[162] We proposed to implement the latter with either case-by-case review of lawsuits involving judgments or settlements exceeding some threshold amount or by compiling a list of federal statutes for which it can reasonably be assumed that actions in violation of the statute did not benefit ratepayers. Neither a threshold amount nor a tentative list of statutes was proposed.

54. The Commission's previous attempt to extend litigation cost rules to violations of federal statutes beyond antitrust was reversed in *Litigation Costs Decision* because the Commission had not justified the application of its rules to costs incurred in non-antitrust lawsuits.[163] All of the commenters addressing this proposal, except MCI, argue that the Commission still has not provided a justification and that rational implementation would be virtually impossible. Carriers remind us of the wide variety of laws they encounter in their business, including environmental, tax, securities, employment, and occupational and safety laws, and argue that violations likely occur because of what a carrier might consider a reasonable

[161] *NPRM*, 8 FCC Rcd at 6658.

[162] *Id.* at 6658-59.

[163] *Litigation Costs Decision*, 939 F.2d at 1046.

interpretation of the law and one from which the ratepayers might have benefited.[164] According to USTA:

> The Commission lacks the ability and the resources to determine, for example, whether the level of preservative historically used in telephone poles should be viewed as environmentally appropriate in the future, whether a carrier's decisions among alternative ways to dispose of lead cable sheathing are prudent, or whether choices among alternative methods to notify customers of rules contemplated by other agencies are cost effective in light of the requirements eventually adopted. All of these have been real situations confronted by both exchange and interexchange carriers . . . .[165]

BellSouth argues that compiling a list of statutes is impossible, because the reasonableness of the carrier's conduct when it made the decision leading to the violation, not the fact of the violation of any particular statute, is the test for determining whether the ratepayers benefited.[166] No carriers other than MCI suggest statutes other than antitrust for which a violation could be presumed not to benefit ratepayers.[167]

55. The Pacific Companies agree with the Commission that state antitrust actions can be treated consistently with federal antitrust litigation costs, but only if the Commission clearly defines what is meant by state antitrust action.[168] Because state unfair competition statutes vary from state to state and many include business torts, which the Commission treats as ordinary expenses, simply extending the litigation cost rules to state antitrust statutes may not give carriers clear enough guidance about how they are to record judgments and settlements in state litigation.

56. Upon further analysis, we conclude that we should not extend application of the rules adopted in this Order to govern accounting treatment of judgments and settlements beyond costs associated with federal antitrust lawsuits. We have inadequate information about state antitrust laws and did not intend to perform *ad hoc* analyses of the consistency between state and federal antitrust laws. We also have no basis on this record to presume that conduct violating any other federal statutes "could not, at the time it was undertaken, reasonably be expected to

[164] Ameritech at 3; Bell Atlantic at 4.

[165] USTA at 29-30.

[166] BellSouth at 35-36.

[167] *See* Bell Atlantic at 4 ("By the Commission's own reasoning, antitrust violations are unique . . . .").

[168] Pacific Companies at 15-16.

produce a net benefit to ratepayers."[169] The court reminds us that what "the ratepayers would have decided in their own economic self-interest" would be a "right" decision, even if it turned out to be wrong after the law was interpreted.[170] The few examples of possible violations the record contains, found in the USTA Comments, support this analysis. Thus, for violations other than federal antitrust violations, we will retain the existing presumption applying to all litigation costs; *i.e.*, that they arise out of events occurring in the normal course of providing service to ratepayers, and that ratepayers benefit from provision of service. MCI argues that we should use litigation cost rules to provide carriers with an economic incentive to obey federal laws,[171] but our authority is limited to implementing the Communications Act of 1934, as amended. We are authorized to consider violations of other laws only to the extent that they directly bear on our responsibility to ensure just and reasonable rates, not because we have broad, general responsibility to ensure the public interest.[172]

57. MCI recommends that the Commission extend litigation cost rules to violations of the Communications Act so that carriers cannot recover from ratepayers any expenses incurred in cases brought by ratepayers to redress a carrier's Communications Act violation.[173] We have concluded that we should not presumptively deny recovery of the costs of judgments and settlements in lawsuits, with no exception for litigation before this agency. Proceedings before an agency regulating a carrier's business seem to be directly related to the carrier's business.[174] This is not to say that the costs of judgments and settlements in proceedings alleging a violation of the Communications Act may always be recovered from ratepayers, but only that the record in this proceeding does not justify erecting a presumption against recovery. Ratepayers believing that the costs in any proceeding are "illegal, duplicative, or unnecessary"[175] or otherwise excludable should make these assertions during the proceeding or in a complaint about rates.

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[169] *Litigation Costs Decision*, 939 F.2d at 1044; *accord Litton Accounting Appeal*, 939 F.2d at 1032-33, *citing Appalachian Elec. Power Co. v. FPC*, 218 F.2d 773, 777 (4th Cir. 1955).

[170] *Litigation Costs Decision*, 939 F.2d at 1045.

[171] MCI at 4-5.

[172] *See NAACP v. FPC*, 425 U.S. at 666, 668-671, *discussed in Litton Accounting Appeal*, 939 F.2d at 1030-31.

[173] MCI at 5-6, Reply at 12.

[174] *See Drisoll v. Edison Light and Power Co.*, 307 U.S. 104, 120-21, *reh'g. denied*, 307 U.S. 659 (1939) (expenses of litigating rate case before commission recoverable); *West Ohio Gas*, 294 U.S. at 72-74.

[175] *NAACP v. FPC*, 425 U.S. at 668; *see id.* at 666, 671; *see generally West Ohio Gas*, 294 U.S. at 73-74.

F. Interim Action

58. In the *NPRM*, the Commission "require[d] carriers to record any antitrust judgments and settlements incurred during this interim period in Account 1439, Deferred charges."[176] The Commission contemplated that, upon completion of the rulemaking, the carriers would be allowed to treat the expenses in accordance with the new rules. BellSouth and COMSAT strongly object to this direction, which BellSouth views as retroactive rulemaking, retroactive ratemaking, and a violation of the six-month notice requirement of 47 U.S.C. § 220(g) and COMSAT views as unauthorized because the previous rules were vacated in *Litigation Costs Decision*.[177]

59. Now that we have resolved this rulemaking, entries deferred in Account 1439 for antitrust judgments and settlements must be removed to the appropriate account. We advised carriers in the *NPRM* that they would have to reclassify these costs once the rules on litigation costs were finalized.[178] In accordance with these requirements, carriers should clear Account 1439 of these entries by moving them to Account 7370 when the rules adopted in this proceeding become effective in accordance with Section 220(g) of the Communications Act.[179] Carriers seeking ratemaking recognition of these costs should make an appropriate filing demonstrating how ratepayers benefited. We disagree with BellSouth that this approach constitutes retroactive ratemaking any more than transferring these charges to an operating account would, because this action does not have as its purpose compensating for past charges that resulted in excessive or inadequate earnings.[180] Rather, this action accomplishes an accounting correction, required to move the entries to the correct account.

60. We also disagree that the Commission's interim action improperly constitutes retroactive rulemaking, because the Commission did not seek to change past accounting entries with the interim rule. Rather, the interim rule became effective thirty days after publication of the *NPRM* in the Federal Register and applied prospectively to "antitrust judgments and settlements incurred in the interim period."[181] This distinguishes the interim action in this proceeding from the invalid retroactive attempt to recoup monies previously paid in *Bowen*, on

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[176] *NPRM*, 8 FCC Rcd at 6659-60, ¶ 30; *see* 47 C.F.R. § 32.1439.

[177] BellSouth at 36-37; COMSAT at 24.

[178] *NPRM*, 8 FCC Rcd at 6660.

[179] 47 U.S.C. § 220(g).

[180] *See Southern California Edison Co. v. FERC*, 805 F.2d 1068,1070, n. 2 (D.C. Cir. 1986); *Nader v. FCC*, 520 F.2d 182, 202 (D.C. Cir. 1975).

[181] *NPRM*, 8 FCC Rcd at 6660, ¶ 35.

which BellSouth relies.[182] The Commission had good cause for the interim action[183] because of its concern that, without litigation cost rules in place, carriers could recover from ratepayers judgments and settlements that should not properly be borne by ratepayers during the period of the rulemaking.[184] Absent interim action, charges to ratepayers for judgments and settlements during the interim period could not be recouped without raising questions about retroactive ratemaking and retroactive rulemaking Rather than requiring carriers to account for judgments and settlements in accordance with the rulemaking proposal or to report and address judgments and settlements in ratemaking proceedings arising during the interim, the Commission fashioned a neutral remedy that would defer accounting for the disputed sums pending the resolution of the rulemaking. This is consistent with *Mid-Tex Electric Co-op.* in which interim FERC rules governing construction work-in-progress were affirmed.[185] The interim rules in that case were similar to ones approved in substantial measure by the court but vacated because FERC had failed to consider anticompetitive consequences, and were fashioned to address the court's concerns while that commission conducted the rulemaking.

VI. FINAL REGULATORY FLEXIBILITY ANALYSIS

61. In the *NPRM*, the Commission certified that the rules it proposed to adopt in this proceeding would not have a significant economic impact on a substantial number of small entities because the proposed rules did not pertain to small entities.[186] No comments were received specifically concerning the proposed certification. However, some comments were received generally concerning the impact of the proposed rules on small entities.[187] For the reasons stated below, we certify that the rules adopted herein will not have a significant economic impact on a substantial number of small entities.[188] This certification conforms to the Regulatory Flexibility Act ("RFA"), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA").[189]

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[182] *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988). *Bennett v. New Jersey*, 470 U.S. 632 (1985); *Greene v. United States*, 376 U.S. 149 (1964); and *de Rodulfa v. United States*, 461 F.2d 1240 (1972), also cited by BellSouth at 37, n. 58, are distinguished for the same reason.

[183] Administrative Procedure Act, 5 U.S.C. § 553 (b)(B).

[184] *NPRM*, 8 FCC Rcd at 6659-60 ¶ 30.

[185] *Mid-Tex Elec. Co-op, Inc. v. FERC*, 822 F.2d 1123 (D.C. Cir. 1987).

[186] *NPRM*, 8 FCC Rcd at 6660.

[187] BellSouth Comments, at 16; USTA Comments, at 15.

[188] 5 U.S.C. § 605(b).

[189] 5 U.S.C. §§ 601-611. SBREFA was enacted as Subtitle II of the Contract With America Advancement Act of 1996 ("CWAAA"), Pub. L. No. 104-121, 110 Stat. 847 (1996).

62. The *NPRM* certified that no regulatory flexibility analysis was required because the entities affected by the proposed rules were either large corporations, affiliates of such corporations, or were dominant in their field of operations and therefore not small entities.[190] However, the rules we adopt in this *Report and Order* apply to all carriers providing interstate services, some of which may be small entities.[191] Moreover, since the *NPRM*, we have stated that although we still consider small incumbent LECs to be dominant in their field of operations, we now include such companies in our regulatory flexibility analyses.[192] Consequently, we cannot certify that no regulatory flexibility analysis is required for the reasons offered in the Notice.

63. Nonetheless, we still certify that no regulatory flexibility analysis is necessary here. As the two parties commenting on small entity issues observed, it is unlikely that a substantial number of small LECs will be subject to federal antitrust litigation.[193] Consequently, it does not appear that the rules will affect a substantial number of small entities. Even if a substantial number of small entities were affected by the rules, there would not be a significant economic impact on those entities. These rules govern the accounting treatment of federal antitrust judgments and settlements in excess of the avoid costs of litigation, but not for litigation expenses.[194] BellSouth, in commenting on small entity issues, contended that the proposed rule which would have required all carriers, including small, to accrue litigation costs in a separate account and record them below the line if the carrier lost its legal action, would be unduly burdensome on small LECs.[195] This *Report and Order* does not adopt that proposal, thereby eliminating this concern.

64. We therefore certify pursuant to section 605(b) of the RFA that the rules adopted in this order will not have a significant economic impact on a substantial number of small entities. The Commission will publish this certification in the Federal Register, and will provide

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[190] *NPRM* at 5981, ¶ 14.

[191] The SBA defines small telecommunications entities as those having fewer than 1,500 employees. 15 C.F.R. § 121.201 SIC Code 4813 (Telephone Communications, Except Radiotelephone).

[192] *See* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *Report & Order*, ¶¶ 1328-30, CC Docket No. 96-98, FCC 96-325 (rel. Aug. 8, 1996).

[193] *See* USTA Comments, at 15; BellSouth Comments, at 16. Nonetheless, small LECs *could* violate the antitrust laws, *see* paragraph 20, *supra*, and therefore we have not exempted small entities from our rules to provide certainty in the treatment of litigation costs in such an instance.

[194] *See* para. 18.

[195] BellSouth Comments at 16.

a copy of the certification to the Chief Counsel for Advocacy of the SBA.[196] The Commission will also include the certification in the report to Congress pursuant to the SBREFA.[197]

VII. ORDERING CLAUSES

65. Accordingly, IT IS ORDERED, that pursuant to sections 4(i), 219 and 220 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 219 and 220, Part 32 of the Commission's Rules IS REVISED as set forth in the Appendix below, effective six months after the date of publication of this Order in the Federal Register.

66. IT IS FURTHER ORDERED, that consistent with this Order, carriers SHALL TRANSFER interim entries of antitrust settlements and judgments from Account 1439 to Account 7370, effective six months after the date of publication of this Order in the Federal Register.

67. IT IS FURTHER ORDERED, that the Secretary SHALL SERVE a copy of this Order on each state commission.

68. IT IS FURTHER ORDERED that the Secretary shall send a copy of this Report and Order including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 605(b) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601 et seq. (1981).

69. IT IS FURTHER ORDERED, that the Secretary SHALL CAUSE a summary of this Order to be published in the Federal Register.

70. IT IS FURTHER ORDERED, the collections of information contained within are contingent upon approval by the Office of Management and Budget.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[196] 5 U.S.C. § 605(b).

[197] 5 U.S.C. § 801(a)(1)(A).

APPENDIX

Part 32, Uniform System of Accounts for Telecommunications Companies is amended as follows:

1. The authority citation for Part 32 continues to read as follows:

Authority: 47 U.S.C. 154, 47 U.S.C. 219, 220.

2. Section 32.7370 is amended by revising paragraph (d) to read as follows:

§32.7370 Special charges.

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(d) Penalties and fines paid on account of violations of statutes. This account shall also include penalties and fines paid on account of violations of U.S. antitrust statutes, including judgments and payments in settlement of civil and criminal suits alleging such violations; and

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